No. 84-627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY COUNCIL OF THE CITY OF CHICAGO, ILLINOIS,
Petitioner,

v.

MARS KETCHUM, et al.,
Respondents,

and

CHARMAINE VELASCO, et al.,
Respondents,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE CORPORATION COUNSEL OF THE CITY OF CHICAGO ON BEHALF OF THE CITY COUNCIL OF CHICAGO IN OPPOSITION

JAMES D. MONTGOMERY
Corporation Counsel of the
City of Chicago
610 City Hall, Chicago, IL 60602
(312) 744-7787

Midwest Law Printing Co. — Chicago 60611 — (312) 321-0220

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This court should reject the petition for *certiorari* for two reasons. First, neither Petitioner City Council of the City of Chicago ("City Council") nor its counsel, the Corporation Counsel of the City of Chicago has authorized the filing of the petition. Second, the decision of the Court of Appeals was entirely correct. Faced with a district court decision that had adopted an indefensible interpretation of the Voting Rights Act and had made almost no ascertainable findings on any issue of substance, the Court of Appeals had no choice but to remand this case for consideration of a full and effective remedy for the violations that had occurred.

STATEMENT OF THE CASE

Petitioner's Statement of the Case all but ignores the trial record and the trial court's oral opinion. Since the trial record and the district court's treatment of that record are fundamental prerequisites to any analysis of the Seventh Circuit's opinion, they are briefly summarized below.

A. How the 1981 City Council Remap Diluted the Voting Power of Black and Hispanic Voters

The 1970's witnessed a substantial shift in the demographic profile of the Chicago population. The white pop-

ulation dropped from 65.5% to 43.2%, while the black and Hispanic populations grew from 32.7% to 39.8% and from 7.3% to 14.0%, respectively. These populations show an extreme degree of residential segregation. Over 92% of Chicago's 1,197,000 blacks reside in two geographically cohesive and overwhelmingly black areas on the South and West Sides of the City. Similarly, the Hispanic population, over 250,000, resides in three geographically cohesive communities.

Under the City's 1970 ward map, blacks in 1970 were in a majority in 15 wards, while Hispanics were not in the majority in a single ward (PX 157).[1] By 1980—under the 1970 ward map—blacks had grown to hold majorities in excess of 62.6% in 19 wards and a plurality of 49.3% in an additional ward; and Hispanics held majorities in four wards and pluralities in two.

In 1981, the City Council redrew the City's 50 wards. In a city that was 43% white, 40% black and 14% Hispanic, the City Council approved a map in November 1981 that gave whites voting age majorities in 28 wards (56%), blacks voting age majorities in 17 wards (34%), and Hispanics voting age majorities in two wards (4%). Consequently, whites, with only 3% more total population than blacks, ended up with voting control in 28 wards, eleven more than blacks.

To accomplish this massive dilution of minority voting strength, the City Council manipulated ward boundaries to reduce minority voting strength within specific wards, and it "fractured" large and cohesive black and Hispanic communities by placing many of their residents in neigh-

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[1] *Citations.* The trial transcript is cited "Tr. ____"; plaintiffs' trial exhibits, "PX ____"; defendant's trial exhibits, "DX ____"; the petition for writ of *certiorari*, "Cert. Pet. ____"; the appendix to the petition for writ of *certiorari*, "App. ____."

boring wards where they would constitute a minority of the population. Both techniques were employed in textbook fashion.

First, specific ward boundaries were redrawn to reduce black or Hispanic populations. For example, four wards that had been majority-white in 1970 had turned majority-black by 1980 (Wards 37, 15, 9 and 7), and a fifth ward (Ward 18) had turned from majority-white to plurality-black (PX 41; PX 137). The following chart shows how the City Council responded to those changes:

Ward	Black Pop. 1970	Black Pop. 1980 Old Boundaries	Black Pop. 1980 New Boundaries	Race of Incumbent at Time of Redistricting
37	12.5%	76.3%	36.8%	White
15	8.3%	66.4%	41.7%	White
18	28.3%	49.3%	46.4%	White
7	26.9%	62.6%	58.4%	Black
9	28.3%	90.1%	89.1%	Black

(See PX 41; PX 137; PX 142; Stip. ¶41.) Thus, each of the three wards that had a white incumbent at the time of redistricting was redrawn so that whites ended up with a majority of the voting age population. The 7th Ward, where the black population was approaching the point of political power, was redrawn so as to substantially chip away at the black majority. The only ward left unscathed was the 9th Ward, which had grown so heavily black that it would have been impossible to dissipate the 90% black majority.

The 37th Ward provides a good example of how boundaries were manipulated. To achieve wards of equal population, the 37th Ward's population had to be reduced by 16,886 persons (from 77,394 to 60,101). To accomplish that, 40,035 persons, of whom 38,513 (96.2%) were black, were removed from the ward and 23,149 persons, of whom 19,676 (84.9%) were white, were added to the ward. As

a consequence, a black majority of 76.3% became a black minority of 34.5% (PX 137, 138) (See App. 17).

Second, "fracturing" of the black and Hispanic communities was the rule rather than the exception.[2] Two examples (out of a massive number) will illustrate. Within the South Side predominantly black community live 900,000 persons of whom approximately 820,000 are black (PX 212; DX 70, 129A). This geographically cohesive black community is bordered by Lake Michigan on the east and a ring of seven wards to the south, west and north. More than 110,000 blacks who reside in the outer perimeter of this area were split off and placed in minority status in the surrounding band of seven white-controlled wards.[3] Similar fracturing occurred with Hispanics. Within the Near Northwest Side Hispanic community live more than 130,000 Hispanics. This Hispanic population was splintered among six wards which radiate outward from the heart of the Hispanic community (PX 164-208).

There was no corresponding fracturing of the white community. The City Council's map contained not a single instance in which a sizable white population that could have been included in a majority white ward was fractured off and included in a majority black ward (PX 142, 199 and 205).

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[2] Defendants' witnesses acknowledged this to be true. See, *Ketchum v. Byrne*, 740 F.2d 1398, 1409, n.9 (7th Cir. 1984); App. 20, n.9.

[3] Since each ward required 60,101 residents, this number is sufficient to fill two additional wards. Indeed, experts for both parties testified that accepted redistricting procedures would have produced 15 or 16 majority black wards on the City's South Side instead of 13, as the City Council's map produced (Tr. 885-888; 900-920; 3020-3050; 3734-3745).

B. The Trial Court's Opinion and Remedial Order

On December 21, 1982, Judge Thomas R. McMillen decided this case in an oral opinion (App. 43-71) delivered extemporaneously from the bench. The opinion contains virtually no findings of fact, fails to review the evidence in a comprehensive manner, and undertakes no analysis of existing case law.

First, the trial court rejected plaintiffs' Fourteenth Amendment claim by asserting that the City Council had had no intent to discriminate against blacks and Hispanics. Instead, the court found that "the motivating reason for the adoption of the 1980 redistricting map by the City Council, in my opinion, was to preserve the incumbencies of those members of the City Council who were voting on the map" (App. 47).

Having disposed of plaintiffs' Fourteenth Amendment claim, the trial court turned to plaintiffs' Voting Rights Act claim. The court began by expressing doubt that the Act even applied to redistricting or concerned the dilution of minority voting strength (App. 53).

The court continued that any violations of the Voting Rights Act had to be shown to exist "over the City's 50 wards in a totality" and not in specific areas of the City (App. 56). The trial court based this conclusion on the phrase "totality of circumstances" in Section 2(b) of the Act, which it interpreted as follows (App. 54):

> I think "totality of circumstances" is a very important concept in this particular case because we are not talking about individual wards or legislative districts or Congressional districts. We are talking about a city with 50 different wards in it. I think that is the entity that must be examined.

Having adopted this analysis of Section 2, the trial court declared that it construed Section 2 "as a test of overall

fairness not only to the minorities and the plaintiffs but also the population as a whole" and summarized the issue as follows (App. 57):

> [D]o they [the black and Hispanic plaintiffs] have a reasonably fair opportunity to participate in the voting and elective processes in the City of Chicago.

Having created this test, the court applied it by holding that the City Council vote, "taken simply on its face value," was "fair to everyone living in the City of Chicago" because "each alderman was voting for his constituency and had in mind the rights of his constituents, be they black, Lithuanian, Chinese, or whites, and voted accordingly" (App. 57).

The court then held that because it was looking at the case in the light of overall fairness to the persons in the minority communities, plaintiffs' evidence of fracturing and manipulating specific ward boundaries was not relevant. The court's explanation for disregarding this evidence is crucial to its treatment of the whole case, including its earlier holding on intent. In essence, the court said that when a city is becoming more heavily minority, manipulating boundaries to cause fracturing and packing is both inevitable and excusable. As to fracturing, the court explained (App. 58, emphasis added):

> Fragmenting, of course, will occur in a city where population has been moving and particularly where minority population has been moving and where it has been increasing but primarily when it is moving from the center of the city to the west and to the north, those so-called "fingers" are going to be in somebody else's ward. As long as the person in whose ward is voting on the plan you are going to find minority groups in a ward. There are probably more minority—should say, I can find that there are more minority groups who are black in white majority wards than there are white minorities in black

> majority wards. That is primarily for two reasons, one, that the blacks were moving in a direction that caused them to be somewhat dispersed along the borders of their communities *and, secondly, because of the aldermen who represented those wards into which the blacks were moving, and to some extent the Hispanics were moving, wanted to preserve the majority, whatever it might have been, which elected them to office.*

Thus, the court held that when an expanding black or Hispanic population begins moving into a white ward, the white alderman, to save his incumbency, can properly vote for a plan that will fracture those minority populations in order to preserve the white majority that will protect his incumbency. Indeed, according to the trial court, such fracturing is "really a step toward integration" (App. 59).

Finally, the court turned to the issue of retrogression. Having expressed doubt that dilution of minority voting strength is the concern of Section 2, and having held that it was irrelevant to consider how specific ward boundary changes affected minority communities in Chicago, the trial court concluded that "as a matter of fairness" there should be no citywide retrogression—that is, no reduction of minority voting strength as it existed in the wards just before the ward lines were redrawn. Since there had been 19 majority-black wards before redistricting but only 17 majority-black wards afterwards, the court ruled for the black plaintiffs on this theory (Tr. 4106-4107; App. 62). The trial judge also found that the voting rights of Hispanics had been violated (Tr. 4123; App. 71).

Having found for plaintiffs on the theory of citywide retrogression, the trial court turned to the issue of remedy and declared that "a black majority [must be restored] to the 37th and 15th Wards . . . without changing the basic population mix of the adjacent wards" (App.

62). In restoring black majorities to these two wards, the trial court decided that it would be sufficient to give blacks a bare majority of voting-age population. In the case of Hispanics, the court stated that the 31st, 32nd and 26th Wards should be redrawn so that Hispanics would constitute majorities of 52%, 54% and 55% of the voting-age population, respectively (App. 65).

Two days later, the parties submitted revised ward maps. At that time, plaintiffs moved for an evidentiary hearing on the remedial issue. The trial court denied plaintiffs' motion, declaring that the court was only interested in seeing "if defendants can comply with my ruling" (Tr. 4128). And in fact, the map defendant submitted was not in accordance with the district court's decision. Its map produced Hispanic voting-age majorities in the 26th and 32nd Wards of 50.0% and 38.8%, as opposed to 55% and 54% as the court instructed. At the same time, the Hispanic voting-age majority in the 31st Ward was reduced from 52.4% to 50.6% (DX 261). The map was approved over the objections of the private plaintiffs and the Justice Department.[4]

C. The Seventh Circuit Opinion

The City Council did not appeal from the district court decision. Plaintiffs, dissatisfied with the district court's

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[4] Robert Berman, counsel for the Justice Department, expressed the following views on behalf of the United States Government: (a) "the 15th and 37th Wards [in the revised map] still evidence that same retrogression that this Court found two days ago" (Tr. 4158); (b) in the Hispanic communities the defendants did not even "attempt . . . to come close to complying with this Court's order" (Tr. 4159); (c) the revised map "takes incumbency and weighs it as a higher factor than the voting rights of minorities. The Federal law does not permit that" (Tr. 4160); and (d) the revised map is neither "equitable" nor "fair" to the minority communities (Tr. 4160-4161).

remedy, did. On August 14, 1984, in an amended opinion, the Court of Appeals affirmed in part, reversed in part, and remanded for consideration of the appropriate remedy, finding that the district court had misinterpreted and misapplied Section 2, and that as a consequence, the district court's remedy "[did] not eliminate, in accordance with well-accepted principles of redistricting, the illegal dilution of minority voting strength accomplished by the City Council map." *Ketchum v. Byrne*, 740 F.2d 1398, 1412 (7th Cir. 1984) (App. 1).

The Court of Appeals began by rejecting the district court's overall theory of the Voting Rights Act. It pointed out that "[t]he legislative history and subsequent judicial interpretation of the 1982 amendments [to the Voting Rights Act] clearly demonstrate that claims of vote dilution come within the scope of the Act . . . [and] that the amendments are intended to apply to redistricting plans" (citations omitted). 740 F.2d at 1404; App. 10.

Next, the Court of Appeals rejected the trial judge's theory that it could not look at what was done in individual wards. It wrote:

> In a case where lines are drawn to establish discrete electoral units and to distribute racial and ethnic populations among districts, the ways in which these lines are drawn may become independent indicia of discriminatory intent or result. [Cite omitted.]

740 F.2d at 1405; App. 13.

The Court of Appeals then discussed the importance of the largely undisputed facts and rejected the trial court's assessment of those facts in virtually every respect. It recognized that the manipulation of ward boundaries was "strong evidence of intentional discrimination." 740 F.2d at 1407; App. 16. It expressly found that "the manipulation of racial voting populations" in this case violated Sec-

tion 2. 740 F.2d at 1407; App. 16. It also held, contrary to the district court's reasoning, that fracturing may dilute minority voting strength and violate Section 2, and it found that the fracturing of the Hispanic community, which the trial court had believed legally irrelevant, had unlawfully diluted Hispanic voting strength. 740 F.2d at 1409; App. 21. While the district court had viewed "preserving incumbencies" by manipulating ward racial makeups as legitimate, the Court of Appeals rejected that theory, stating that "discrimination based on an ultimate objective of keeping certain whites in office" is indistinguishable from "discrimination born of pure racial animus." 740 F.2d at 1408; App. 19. Although the Court of Appeals commented that it was unnecessary to make a formal finding that "these considerable indications of minority voting strength dilution through manipulation, packing and fracturing" constituted *intentional* discrimination under the Fourteenth Amendment, it found them basic to a proper assessment of Section 2 of the Voting Rights Act.

Having rejected the district court's legal theories, the Court of Appeals turned to the trial court's treatment of the remedy. Citing the legislative history of Section 2, it began with the observation:

> . . . the remedy fashioned must be commensurate with the right that has been violated. . . . The court should exercise its traditional equitable powers to fashion the relief *so that it completely remedies the prior dilution of minority voting strength* and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice. (Emphasis added.)

And it concluded that the trial court had failed to meet this exacting standard:

> . . . we find that the court-approved map has not provided an adequate remedy for the Voting Rights Act

> violation because it does not eliminate, in accordance with well-accepted principles of redistricting, the illegal dilution of minority voting strength accomplished by the City Council map.

740 F.2d at 1412; App. 27.

The Court of Appeals remanded the case to the district court with instructions to remedy the fracturing of the Hispanic community (740 F.2d at 1418 n.25; App. 41 n.25); to examine whether the fracturing of the black community directly affected blacks' opportunity to elect representatives of their choice, *Id.*; and to give careful consideration to whether the 50% bare voting-age majority standard used by the district court was an adequate remedy. 740 F.2d at 1414-1415; App. 32-33.

In giving this last instruction, the Court of Appeals noted that the "district court rejected for most wards the use of any majority greater than 50% of voting age population as a threshold for determining an effective majority of blacks or Hispanics." 740 F.2d at 1411; App. 25. For two reasons, the Court of Appeals directed the district court to reconsider this question. First, the Court of Appeals found that the trial court failed "to consider carefully all of the factors which are present here . . . and which have led other courts to employ such a corrective (frequently 65% of the total population or 60% voting age population or some variation of these guidelines). . . ." 740 F.2d at 1413; App. 29. Second, the district court's approach failed to recognize that in certain wards, such as the 15th and the 37th, minority groups had achieved majorities of more than 65% of the population prior to redistricting. Thus, in those wards, the reconstruction of "supermajorities" should be viewed not as an artificial supplement to a 50% majority but as a fair antidote to the retrogression that had resulted from the manipulation of racial voting populations. 740 F.2d at 1417; App. 37.

Having identified the errors in the trial court's analysis, the Court of Appeals remanded the case for determination of an effective remedy for the City Council's violations of the Voting Rights Act. In so doing, the Court declined to state what the new ward boundaries should be or precisely what racial percentages should be set. It left these matters to the district court on remand. As the Court of Appeals explained:

> It is not . . . the proper role of this court to formulate its own redistricting plan or to dictate to a district court minute details of how such a plan should be devised.

740 F.2d at 1412; App. 24. See also, 740 F.2d at 1415; App. 33.

REASONS FOR DENYING THE WRIT

This petition should be denied because the petitioner has no capacity under Illinois law to appeal from the Court of Appeals' decision. The petition should also be denied because the Court of Appeals' decision was right. Faced with a district court decision that had misconstrued the Voting Rights Act and that had reached a decision that lacks even the most basic findings of fact, the Court of Appeals had no choice but to remand this case for further proceedings.

I.

PETITIONER LACKS CAPACITY UNDER ILLINOIS LAW TO FILE ITS PETITION

Under F.R.Civ.P. 17(b), the capacity of the petitioner to sue is governed by Illinois law. Under Illinois law, the present petitioner has no legal capacity to file this appeal.

While the appeal of this case was pending in the Court of Appeals, mayoral and aldermanic elections were held in Chicago in April 1983. The previous mayor, Jane M. Byrne, was defeated by Harold Washington, and a new administration took office. A substantial number of new aldermen were also elected to the City Council.

By Illinois law, the Corporation Counsel of the City of Chicago is "the legal advisor of the City Council." Ill.Rev.Stat. 1983, ch. 24, §21-11. By Illinois statute, the Corporation Counsel "shall appear for and protect the rights and interests of the City in all actions, suits, and proceedings brought by or against it . . ." *Id.* Consistent with the State statute, the City Council of the City of Chicago has vested in the Corporation Counsel the exclusive authority to "conduct all of the law business of the City." Chapter 6, §6-2(a) of the Municipal Code of Chicago.[5] This includes the authority to decide whether or not an appeal should be pursued. "[W]hen the Corporation Counsel is of the opinion that an appeal is not justified, he may certify such judgment to the City Comptroller at any time. . . ." *Ibid.*, §6-2(d).

When the Court of Appeals rendered its initial decision in May 1984, the new administration carefully reviewed the opinion and concluded that the decision was correct, that the redistricting litigation should end, and that it was in the best interest of the City of Chicago that the decision be implemented as expeditiously as possible. To that end, the present Corporation Counsel sent a letter to the private attorney, William J. Harte, who had been approved by the previous administration's Corporation Counsel in 1981 to represent the City Council in the litigation. The letter advised this attorney that his services were no

[5] A copy of this ordinance is attached hereto as Exhibit A to this brief.

longer needed. (This letter is attached to the Response in Opposition to Petition for Stay of Mandate filed by the Corporation Counsel in this Court.) Immediately thereafter, the Corporation Counsel entered his appearance for the City Council.

However, Mr. Harte has taken the position that he is entitled to pursue further appellate proceedings in the name of the City Council. He took this position neither on the basis of an authorization from the Corporation Counsel nor on the basis of a City Council resolution, but on the basis of individual authorizations from 26 members of the 50-member City Council. On the basis of these individual authorizations, Mr. Harte has commenced proceedings in the name of the "City Council."

While a number of individual aldermen obviously support this effort to appeal to this Court, they lack authority to do so without a formal resolution or ordinance, adopted by the City Council, directing such action. *Hotchkies v. City of Calumet City*, 377 Ill. 615, 619, 37 N.E.2d 332 (1941); *Wheeling Trust and Savings Bank v. City of Highland Park*, 97 Ill.App.3d 519, 423 N.E.2d 245 (Ill.App. 1981); *Hadley v. Bd. of Trustees of Firemen's Pension*, 447 N.E.2d 958, 961 (Ill.App. 1983). The City Council, as a legislative body, has never taken steps to authorize such action. Consequently Mr. Harte has no power to pursue this petition on the "City Council's" behalf, or on behalf of any other party, since all parties other than the City Council were dismissed before the appeal to the Seventh Circuit.

To summarize: neither the City Council nor the Corporation Counsel has authorized the filing of the petition for *certiorari*. As the only authorized legal representative of the City Council, the Corporation Counsel respectfully requests this Court to deny the petition for *certiorari* so that remedial proceedings on remand can begin at once.

II.

IN LIGHT OF THE TRIAL COURT'S PERVASIVE ERRORS, THE COURT OF APPEALS HAD NO CHOICE BUT TO REMAND THIS CASE

The Court of Appeals found that the district court decision on the Voting Rights Act was based on a thoroughly mistaken set of legal principles. Because it misinterpreted the law, the district court failed to properly analyze the particular instances of unlawful dilution of minority voting strength that respondents proved. And while it rightly found the Act had been violated, its identification of the actual violations was so totally deficient as to require remand.

As will now be shown, the petition for *certiorari* scarcely disputes that the district court used a mistaken set of Voting Rights Act principles to consider this case. Instead, the petition focuses on one limited aspect of the Court of Appeals' analysis—its instruction that the district court on remand consider whether black or Hispanic majorities in excess of 50% voting-age population may be appropriate in several wards.

As will be seen, nothing about this non-mandatory suggestion deserves this Court's review. Whatever the details of the remedy may turn out to be, the district court's decision could never have been allowed to stand. And the Court of Appeals was right to require consideration on remand of possible majorities in excess of the bare minimum ordered by the district court.

A. The Trial Court's Erroneous Interpretation of Section 2 Required Remand By the Court of Appeals

Totally aside from the issue of proper majorities, the Court of Appeals had no choice but to remand for further proceedings, for everything the trial court did was

based on erroneous legal standards.[6] *United States Postal Service v. Aikens*, ... U.S. ....., 103 S.Ct. 1478, 1483 (1983); *Kelly v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974); *United States v. General Motors*, 384 U.S. 127, 141 n.16 (1966).

Thus, the greater pa. . of the Court of Appeals' opinion is spent correcting the district court's erroneous legal theories of Section 2 of the Voting Rights Act.

(1) The trial court had begun its analysis of Section 2 by expressing doubt that the Act even applied to redistricting plans or that it was concerned with the dilution of minority voting strength. This reservation permeates the entire opinion. The Court of Appeals disagreed and found that Section 2 applied to redistricting plans and that "claims of vote dilution come within the scope of the Act". 740 F.2d at 1404; App. 10. Petitioner neither defends the district court's misinterpretation of the Act nor protests the Court of Appeals' reading of it.[7]

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[6] Indeed, the trial court's treatment of the evidence bears none of the normal indicia of careful consideration. Even the most basic facts about this case cannot be gleaned from its opinion. One cannot tell from the opinion what the racial makeup of the wards was before or after the remap; what changes were made to reduce black and Hispanic voting strength in each ward; what testimony was offered by any witness; or what plaintiffs' theories of liability were. The trial court made no attempt to review all of the evidence in a comprehensive manner, failed to point with specificity to a single piece of evidence it found persuasive, and offered no reasons for rejecting countervailing evidence. It thereby disregarded the mandate of Rule 52(a) of the Federal Rules of Civil Procedure. That alone would have been grounds for reversal. See, *e.g.*, *McIntosh Cty. NAACP v. City of Darien*, 605 F.2d 753, 757 (5th Cir. 1979).

[7] The legislative history leaves no question that the Court of Appeals' reading of Section 2 is correct.

(Footnote continued on following page)

(2) The district court had concluded that in considering whether Section 2 has been violated, the court should not look at what was done in individual wards (Tr. 4099-4101; App. 57-58). The Court of Appeals reversed this unfounded theory:

> In a case where lines are drawn to establish discrete electoral units and to distribute racial and ethnic populations among districts, the ways in which these lines are drawn may become independent indicia of discriminatory intent or result.

740 F.2d at 1405; App. 13. Here again, the Court of Appeals' approach is consistent with all the decisions under Section 2, all of which look at the impact of specific boundary changes on minority voting strength. *Gingles v. Edmisten*, 590 F.Supp. 345, 372-375 (E.D.N.C. 1984) (three judge court), *cert. denied*, 104 S.Ct. 1433 (1984); *Major v. Treen*, 574 F.Supp. 325, 353 (E.D.La. 1983) (three judge court); *Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1113-1117 (N.D.Ill. 1982) (three judge court); *Busbee v. Smith*, 549 F.Supp. 494, 517 (D.D.C. 1982) (three judge court); *Buskey v. Oliver*, 565 F.Supp. 1473, 1483 (M.D.Ala. 1983).

(3) The trial court had exonerated the very things about the City Council's map that most clearly violated Section

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[7] *continued*

> As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength. Such other measures may include switching to at-large elections, annexations of predominantly white areas, *or the adoption of discriminatory redistricting plans.*

S.Rep. No. 97-417, 97th Cong., 2d Sess. at 8 (hereinafter, "Senate Report") (emphasis added). To avoid any ambiguity, the Senate Report concludes, "This section without question is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote" (Senate Report, 30 n.120).

2. For example, the trial court found no fault with defendant's pervasive fracturing of black and Hispanic communities, and indeed it opined that such fracturing was a positive "step toward integration" (Tr. 4101-4103; App. 58-59). However, the Court of Appeals recognized, as has every court before it, that fracturing may dilute minority voting strength and violate Section 2. 740 F.2d at 1408-1409; App. 18-19.[8] Petitioner does not question this conclusion.

(4) The trial court had found that the manipulation of ward boundaries to reduce minority voting strength was excusable if motivated by incumbents who "wanted to preserve the majority . . . which elected them to office" (Tr. 4101; App. 58). The Court of Appeals denounced such manipulation of ward boundaries and found that "the manipulation of racial voting populations to achieve retrogression" in this case violated Section 2. 740 F.2d at 1406; App. 14. Petitioner does not challenge this holding, which is consistent with the existing case law. See, *e.g.*, *Major v. Treen*, *supra*, 574 F.Supp. at 1109-1112; *Buskey v. Oliver*, *supra*, 565 F.Supp. at 1483.

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[8] Courts recognize fracturing as the classic device for diluting the voting strength of a large, geographically cohesive minority community:

> The most crucial and precise instrument of the denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive minority voting community. . . . This dismemberment of the black voting community . . . [has] had the predictable effect of debilitating the organization and decreasing the participation of black voters.

Kirksey v. Board of Supervisors, 554 F.2d 139, 149 (5th Cir. 1977) (footnote omitted). It is not surprising, therefore, that fracturing was one of the principal evils at which the Voting Rights Act was directed. See *United Jewish Organizations v. Carey*, 430 U.S. 144, 158 (1977).

(5) The trial court had viewed "preserving incumbencies" by manipulating racial groups[9] as a legitimate motivation in this case. The Court of Appeals recognized that "discrimination based on an ultimate objective of keeping certain whites in office" is indistinguishable from "discrimination born of pure racial animus." 740 F.2d at 1408; App. 19.

In short, entirely independently of the question of the proper majorities on remand, the Court of Appeals faced a district court opinion that had been constructed on a thoroughly erroneous interpretation of the Act. It therefore had no choice but to remand for further proceedings. See, *Pullman-Standard v. Swint*, ... U.S. ....., 102 S.Ct. 1781 (1982).

B. The Instruction That the District Court Consider the Appropriateness of Black and Hispanic Majorities of Over 50% Voting-Age Population Is Sound

The focus of the petition is on the Court of Appeals' directive that on remand, the district court carefully consider the appropriateness of using black and Hispanic majorities of more than 50% voting age population to remedy the violations that have been found to exist. According to petitioner, the Court of Appeals has rewritten Section 2 to require the "maximization" of minority voting

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[9] In this case, there was no question about the City Council's motive when drawing the 1981 ward map. Alderman Pucinski provided the explanation: "[T]here was an effort made to protect the incumbents" and, in particular, "an effort was being made to save [Alderman] Casey" [the white alderman of the 37th Ward] (PX 73B). However, the Council's interest in protecting incumbents was not evenhanded. While white incumbents were all protected, minority aldermen Joseph Bertrand (a balck alderman from the 7th Ward) and Jose Martinez (an Hispanic alderman from the 31st Ward) were redistricted out of their wards.

strength or to "guarantee the election of a . . . minority group" (Cert. pet. at ii). This charge is unfounded.

The district court concluded that 50% voting age majorites would presumptively remedy all violations of the Act. The Court of Appeals rejected this conclusion. It recognized that the district court's approach failed to take account of the fact that in key wards, such as the 15th and 37th, the pre-remap black majorities had reached 66% and 76% respectively. In the face of these facts, the partial restoration to a 50% majority is not, in the words of the Court of Appeals, a "fair antidote to retrogression." 740 F.2d at 1417; App. 37. Similarly, it is not a "fair antidote" to the fracturing of the Hispanic community.

This analysis is unassailable. A complete and effective remedy must aim, so far as possible, to provide blacks and Hispanics with the same opportunity to elect representatives of their choice that they would have had but for defendant's unlawful dilution of black and Hispanic voting strength. Put differently, the district court should have asked, in considering a remedy, what the likely ward configuration would have been but for the illegal packing, fracturing and manipulation that actually took place. On this record, there was no reason to assume that absent the unlawful dilution, blacks and Hispanics would have had nothing more than bare 50% voting age majorities in each of the wards that had been distorted by the City Council's unlawful dilution. To the contrary, the reason these Voting Rights Act violations took place was that blacks and Hispanics otherwise would have had solid majorities in the wards in question.

Thus, as the Court of Appeals rightly held, there was no basis for presuming that a bare majority of voting age population would restore blacks and Hispanics to where they would have been but for the Voting Rights Act viola-

tions in question. To the contrary, there is the strongest reason to reject such a presumptive remedy: *It would encourage violations of the Act.* If the creation of bare 50% voting majorities were presumptively appropriate to remedy a Voting Rights Act violation, then incumbents in jeopardy because of racial changes within their wards would be encouraged to decimate the voting strength of the racial group that threatens their incumbency. If they are later caught by a court, the only consequence will be to restore the "other" racial group to a level that affords them no more than an even "50/50" chance to win—no matter how great a majority that group would have had in the absence of the violation. Thus, even with such a "remedy," such incumbents will have improved their position at the expense of the other racial group.

The petitioner seems to argue that a remedial order giving minorities in a given ward a mere 50% voting age population would, as a practical matter, give them a fair opportunity to elect candidates of their choice, even though in the absence of the violation they might have had a far greater percentage of that ward. The district court accepted this view, holding, in essence, that no matter what that percentage would have been, a 50% voting-age majority will suffice to correct the problem.

But the Court of Appeals rightly found the district court's treatment of this important question to be totally inadequate. Indeed, because of its lack of specific findings and its refusal to cite to specific evidence, it is not possible to discern with any confidence *what* evidence the district court found persuasive in reaching its conclusion that a 50% standard will correct any dilution, no matter how massive, of black voting strength. As the Court of Appeals pointed out, there was evidence, including statistical evidence, that minorities in Chicago need more than a

bare voting age majority to have a realistic chance to elect a candidate of their choice. For example:

(a) There was expert testimony that adjustments for lower minority registration and turnout guidelines typically were made in voting rights cases. Indeed, as the panel noted, defendant's own redistricting expert, Mr. Brace, testified that the 65% guideline has received wide recognition and acceptance in the redistricting field for precisely that reason. 740 F.2d at 1414.

(b) There was evidence, based on the Chicago political experience, that minorities in Chicago traditionally have been able to elect aldermen only when the minority population reaches the 65%-70% level in a ward. 740 F.2d at 1414. There was no testimony to the contrary.

(c) There was statistical evidence that majorities of 65% or more are needed to provide an effective remedy in the wards that had to be redrawn. Again, defendant's redistricting expert Mr. Brace found that on the average Hispanics in Chicago need 70% majorities in order to have a meaningful opportunity to elect candidates of their choice (Tr. 3790). And he found that blacks in Chicago needed 65% (PX 401).

There is no indication in the trial court's opinion that the trial court considered any of this evidence. Since the district court failed to address this problem in any coherent way, the Court of Appeals rightly instructed it to do so on remand. In so instructing, it was in full accord with this Court's cases that require remand when a trial court fails to consider relevant evidence. See, *e.g.*, *Inwood Laboratories v. Ives Laboratories*, ... U.S. ....., 102 S.Ct. 2182, 2190 n.19 (1982).

While the district court's opinion casts virtually no light on just what evidence it considered on this issue, the petition for *certiorari* tries to make up that deficiency. Ac-

cording to the petition, the district court was relying upon "statistics, as opposed to assumptions, of voting age population, voter registration and voter turnout for white, black and Hispanic groups for elections from 1975 to 1982" (Cert. Pet. at 3). According to petitioner, these statistics were generated by "one of the most extensive data bases ever developed" (*Id.*), and they purportedly show that minorities now register and vote in as great percentages as whites.

For two reasons, this argument has no merit. First, an appeal to the Supreme Court is not the place to conduct a factual analysis that the district court failed to conduct. As the Court of Appeals correctly observed,

> Examples of the sort of statistics which a district judge might wish to evaluate for their reliability and significance were provided by both the defendant-appellee in its rehearing petition, although not in its original briefs and argument, and by the plaintiffs-appellants in their answer. In its rehearing petition, the defendant included a chart with data on black voter registration and turnout for the elections from 1979 to 1982. Rehearing Petition at 12. While it would be within the district court's discretion to accept, reject or utilize such statistics in a modified form, the district court would be required to explain and justify its reliance on such statistics and on the numbers on which they are based.

740 F.2d at 1414 n.18; App. 32 n.18.

Second, when the district court on remand ultimately analyzes petitioner's touted "data base," it will find something different than what petitioner describes in its petition for *certiorari*.

Contrary to the implication of defendant's petition, the City of Chicago does *not* maintain *any* voter registration and turnout statistics by race. Petitioner's figures for

racial turnouts are nothing but estimates based on an expert's extrapolations made on tenuous assumptions. This is not the place to describe the bizarre results of those extrapolations. Suffice it to say that this analysis "showed" a startling number of instances where more people were registered than actually lived in a precinct or ward.[10] Without denigrating the utility of expert attempts to ascertain racial turnouts in the absence of direct evidence, it is clear that on remand the court will have to make the most careful analysis and findings of any such studies.

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[10] In order to be able to make these estimates, petitioner's expert, Kimball Brace, obtained: (a) 1980 census data showing the number of voting age people in each geographical census unit (census "tracts" and "blocks"), and (b) Chicago Board of Election figures showing the number of people registered and the number of people who voted in each election year (1975-1982) in each geographical voting unit (wards and precincts). To calculate an estimated registration rate or turnout rate for any particular election, Mr. Brace had to "match" census blocks to precincts, and then compare the number of people who registered (or turned out to vote) in that election year (e.g. 1979), to the number of people who lived in the corresponding census blocks at the time of the 1980 census (Tr. 3653-3656, 3793-3804).

This analysis led, however, to massive errors, because there is no way to determine whether the voting age population in any precinct was the same on election day in 1979 (or any other year) as it was at the time of the 1980 census. Indeed, both common sense and the facts on the record tell us that there are significant population changes over time. The difference of even a year is significant. For example, the population shifts between 1979 and 1980 were sufficiently great that plaintiffs could identify over 100 precincts in which Mr. Brace's registration rates in the 1979 election exceeded 100% of the 1980 voting age population in these precincts (Tr. 3797-3799).

Mr. Brace's "data base" also revealed that 100.4% of the voting age population in the 11th Ward was registered to vote. Even in Chicago, that number is too high.

Moreover, the difficulty in estimating overall registration and turnout rates pales in comparison with the difficulty in estimating separate rates for blacks, whites and Hispanics.

Such an analysis and findings are precisely what was missing from the district court's oral opinion in this case.[11]

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES D. MONTGOMERY
Corporation Counsel of the
City of Chicago
610 City Hall, Chicago, IL 60602
(312) 744-7787

[11] In any case, the only estimates produced by petitioner that suggest that black registration and turnout rates approach those of whites came from the November 1982 gubernatorial election. That election took place as this lawsuit was winding to a close, and thus received little, if any attention. Recognizing this fact, the Court of Appeals stated:

> We understand that the November 1982 gubernatorial election in Illinois and the 1983 Chicago mayoral election indicated a marked increase in black registration and turn-out. If these and other elections should demonstrate a significant and consistent change in voting behavior in Chicago applicable to aldermanic elections, there would have to be a corresponding change in redistricting practices and legal standards, although the results of these elections may not be adequate to justify an abandonment or modification of previously accepted guidelines at this juncture. It initially remains within the discretion of the district judge, however, to determine when such a consistent and reliable pattern has emerged and when adequate and trustworthy statistics concerning minority voter registration and turn-out are available. At that juncture the application of an adequate corrective may be considered or reconsidered.

740 F.2d at 1416 n.21; App. 36 n.21.

EXHIBIT A

CHAPTER 6
DEPARTMENT OF LAW

6-1. There is hereby established an executive department of the municipal government of the city which shall be known as the department of law, and which shall embrace the corporation counsel and such assistants and clerks as may be provided for in the annual appropriation ordinance.

6-2. There is hereby created the office of corporation counsel. He shall be appointed by the mayor, by and with the advice and consent of the city council, and shall be the head of the department of law of the city.

The corporation counsel shall perform the following duties:

(a) Superintend and, with his assistants and clerks, conduct all the law business of the city;

(b) Appear for and protect the rights and interests of the city in all actions, suits and proceedings brought by or against it or any city officer, board or department, including actions for damages when brought against such officer in his official capacity;

(c) Appear for and defend any member, officer or employee of the board of health, police department or fire department who is sued personally for damages claimed in consequence of any act or omission or neglect of his official duties or in consequence of any act under color of authority or in consequence of any alleged negligence while engaged in the performance of such duties.

(d) Certify to the city comptroller all judgments rendered against the city as of the date following the last day on which appeal may be made, when in the opinion of the corporation counsel no further proceedings are proper; provided, that when the corporation counsel is of the opinion that an appeal is not justified, he may certify such judgment to the city comptroller at any time, and provided further, that when a judgment is rendered against any member of the police department for injury to person or property resulting from the performance of his duties as a policeman, he shall certify any judgment to the city comptroller for payment by the city, when, in his opinion, such member of the police department has not been guilty of wilful misconduct and the corporation counsel is of the opinion that an appeal is not justified. [Amend. Coun. J. 2-26-41, p. 4280; 4-28-52, p. 2306.]

6-3. Upon the expiration of his term of office, or his resignation thereof, or removal therefrom, the corporation counsel shall forthwith, on demand, deliver to his successor in office all deeds, leases, contracts, books and papers in his hands belonging to the city, or delivered to him by any of its officers, and all papers or information in actions prosecuted or defended by him then pending and undetermined, together with his register thereof and record of the proceedings therein.

6-4. The corporation counsel shall keep or cause to be kept, in proper books to be provided for that purpose, a register of all actions in court prosecuted or defended by his office and all proceedings had therein. These books

shall at all times be open to the inspection of the mayor, comptroller, or any member or committee of the city council.

6-5. The corporation counsel shall, when required so to do, furnish written opinions upon subjects submitted to him by the mayor, the city council, or the head of any department.

6-6. The corporation counsel shall draft such ordinances as may be required of him by the city council or by any committee thereof.

He shall draw any deeds, leases, contracts, or other papers required by the business of the city, when requested so to do by the mayor, the city council, or the head of any department.

6-7. The corporation counsel shall have general supervision of the revision of ordinances and the insertion of general ordinances into this code in accordance with sections 1-4 and 1-8.

6-8. The corporation counsel shall have authority, when directed by the city council, to make settlements of lawsuits and controverted claims against the city.

It shall be the duty of the corporation counsel and all other officers of the city, if any, who shall be given authority to make settlements of lawsuits or controverted claims against the city, to report in writing, at the first regular meeting of the city council in each and every month all cases where settlements have been made of such lawsuits or claims.